No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the First Interim Report of the Special Master

REPLY BRIEF OF THE CITY OF CHARLOTTE IN RESPONSE TO EXCEPTIONS OF THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED

The City of Charlotte, North Carolina, possesses a Certificate, issued by the North Carolina Environmental Management Commission, authorizing Charlotte to carry out 33 million gallons per day in inter-basin transfers from the Catawba River. Charlotte's inter-basin transfers are the real targets of South Carolina's Complaint, which seeks to enjoin Charlotte's inter-basin transfer authority.

The question presented is whether the Special Master properly concluded that Charlotte should be allowed to intervene as a party defendant to defend her inter-basin transfer authority.

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REPLY BRIEF OF THE CITY OF CHARLOTTE IN RESPONSE TO EXCEPTIONS OF THE STATE OF SOUTH CAROLINA

INTRODUCTION

The Special Master correctly concluded that the City of Charlotte—the largest municipality and the largest provider of water supply and wastewater treatment services on the Catawba River—deserves the status of a party defendant in this original action. Charlotte possesses a certificate issued by the North Carolina Environmental Management Commission ("EMC") authorizing Charlotte to execute the inter-basin transfer ("IBT") of up to 33 million gallons per day ("MGD") from the Catawba River. Charlotte thus is the governmental entity in North Carolina vested with the authority to carry out the inter-basin transfers that are the true targets of South Carolina's Complaint. And Charlotte is the only entity that has carried actually out inter-basin transfers of water from the North Carolina portion of the river pursuant to a certificate issued by the EMC. The Special Master rightly ruled that, as "the authorized agent of the execution of the sovereign policy" allegedly injuring South Carolina, Charlotte is properly accorded party status. *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*).

STATEMENT

A. Procedural History and Special Master's Findings and Conclusions

On January 15, 2008, this Court appointed Kristin Linsley Myles as Special Master and delegated to her the authority "to direct subsequent proceedings" in

the case. *South Carolina* v. *North Carolina*, 128 S. Ct. 1117 (2008). On February 13, 2008, the City of Charlotte filed her motion for leave to intervene. On March 17, 2008, this Court referred Charlotte's motion to Special Master Myles.

On March 28, 2008, the Special Master held a hearing on the intervention motions filed by the City of Charlotte, Duke Energy Carolinas, LLC ("Duke") and the Catawba River Water Supply Project ("CRWSP"). *See* Hearing Transcript ("Hrg. Tr."). On May 27, 2008, the Special Master granted the motions. *See* Order Granting Motions for Leave to Intervene ("SM Order"). On November 25, 2008, the Special Master issued a report recommending that this Court permit the interventions of Charlotte, Duke, and CRWSP. *See* First Interim Report of the Special Master ("SM Report").

As the Special Master found, "Charlotte is the largest municipality and provider of water supply and wastewater treatment services in the Catawba River basin." SM Report at 21. Furthermore, "Charlotte is the entity in North Carolina vested with authority to carry out the large majority of the inter-basin transfers of which South Carolina complains." *Id.*

In light of these findings, the Special Master correctly concluded that "Charlotte's interest in this case is compelling" and that "Charlotte has a direct stake in the present controversy." SM Order at 8. Indeed, "Charlotte has a unique interest in protecting her inter-basin transfer permit." *Id.* *See also id.* at 9 ("Charlotte has a special interest that sets it apart from the other citizens and creatures of the state whom North Carolina represents"). Charlotte

has "presented an interest sufficiently compelling and concrete" (SM Report at 25) to make her intervention proper.

B. Charlotte's Water Supply and Wastewater Treatment Services

Charlotte is the largest of 18 Metropolitan Statistical Areas in the two Carolinas, and is by far the largest provider of water supply and wastewater treatment services in the Catawba River basin. Since 1911, when Charlotte first tapped the Catawba River for water, the breadth of Charlotte's services has grown steadily until, in 2006, Charlotte served a population of more than 800,000 in six counties and nine towns in both North Carolina and South Carolina. Charlotte also has service connections with the City of Concord in Cabarrus County, and with Union County, enabling Charlotte to serve these areas on an emergency basis when needed. A cost-effective response to the water supply and sewage treatment services requirements of the metropolitan area's rapid expansion is likely to depend on Charlotte's system.

Charlotte's water supply service accounts for approximately 53 percent of all municipal usage of the water resources of the Catawba River basin. Among North Carolina users, Charlotte withdraws 64 percent of the water taken from the Catawba River for municipal water supplies.

Charlotte's population and her institutional, industrial, and commercial customer base are growing rapidly. From 1987 through 2006, the population in Charlotte's service area grew from about 480,000 to more than 800,000, and the demand for treated water supplies grew from 57 MGD to 110 MGD.

Recent studies project that these demands will continue to increase at an annual rate of 1.5 percent, resulting in water supply needs of 215 MGD and wastewater treatment needs of 159 MGD by 2050.

C. Charlotte's Inter-Basin Transfers and IBT Certificate

Charlotte is responsible for public water supplies to all of Mecklenburg County, which lies in the rolling terrain of the Appalachian foothills spanning the Rocky/Ya[illegible]n/Pee Dee ("RYPD") and Catawba River basins. The Catawba River forms the County's western boundary. A north-south ridgeline transects the County, leaving approximately the eastern one-third portion of the County in the RYPD basin, which offers far less plentiful and less dependable water supplies. For this reason, Charlotte relies on its Catawba River intakes and well-established system of water treatment facilities to service customers in both basins. After use, treated wastewater in the RYPD basin is discharged to local streams and rivers rather than being piped back to the Catawba River basin for discharge. This efficient process for serving all residents of the County results in inter-basin transfers.

Since 1990, Charlotte has experienced considerable population growth in the northern and eastern portions of its service area within Mecklenburg County. Much of the increased water demand resulting from population growth in these areas arises just east of the ridgeline within the RYPD basin. Especially in the northern portion of the service area, these expanding communities are located only a few miles from Charlotte's high-capacity water intake at Lake Norman on the Catawba River just west of the ridgeline. These customers cannot rely on the mea-

ger headwaters of the nearby Rocky River, and are located some 20 miles from the modest water flows of the upper reaches of the Yadkin River to the east.

On March 14, 2002, the EMC approved Charlotte's request for an increase in its IBT authority from 16.1 MGD to 33 MGD in order to meet water supply needs in eastern Mecklenburg County through the year 2030. *See* Environmental Management Commission, Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.221 (Mar. 14, 2002) (attached as Exhibit 2 to Charlotte's Motion for Leave to Intervene) (1e-11e).

In granting Charlotte such increased IBT authority, the EMC found that

> the transfer is necessary to supply water to the growing communities of this area. Water from the source basin is readily available and within a short distance from the service area. Therefore the transfer is a reasonable allocation to these communities. The transfer will greatly benefit these communities by providing raw water of high quality for residential and industrial purposes.

Id. at 4e. The EMC also analyzed the effect of Charlotte's proposed 33 MGD IBT authority on the entire Catawba River basin, including water flows and utilization in South Carolina, and specifically found that, even with the resulting reductions in flows from Lake Wylie into South Carolina, detrimental effects on the basin would be "insignificant." *Id.* at 5e.

D. South Carolina's Targeting of Charlotte's Inter-Basin Transfers in this Case

As the United States and South Carolina have noted, this Court only "sparingly" exercises its discretion to permit a State to initiate suit under the Court's original jurisdiction. Br. for U.S. as *Amicus Curiae* at 9; *see* S.C. Exceptions at 17. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983).

The Court has decided that this is such a case. *See South Carolina* v. *North Carolina*, 128 S. Ct. 349 (2007) (granting South Carolina's motion for leave to file bill of complaint). At the time the Court made that decision, it had before it South Carolina's Complaint ("Complaint"), the Brief of the State of South Carolina in Support of its Motion for Leave to File Complaint ("S.C. Br. in Support of Complaint"), and South Carolina's Reply Brief in support of her motion ("S.C. Reply Br."). Those documents set forth the specific allegations of injury to South Carolina, the specific actions in North Carolina allegedly causing that injury, and a prayer for relief seeking a decree from the Court enjoining those specific actions in order to redress the alleged injury. South Carolina satisfied the Court that the supposed harm in South Carolina, allegedly being caused by specific actions in North Carolina, was of such a serious magnitude that the Court should exercise its jurisdiction.

Several specific actions in North Carolina prompted South Carolina to bring this lawsuit and persuaded the Court to exercise its jurisdiction. Those actions

in North Carolina essentially boil down to Charlotte's inter-basin transfer of water from the Catawba River basin.

1. Actions in North Carolina Alleged to Cause Harm to South Carolina

South Carolina explains that she "has attempted to resolve *this dispute* through negotiations * * * but North Carolina has not been receptive to such efforts * * *." S.C. Br. in Support of Complaint at 1 (emphasis added). Left with no other option, she sought leave to file her Complaint. *See id.* at 1-2. According to South Carolina, her attempt at negotiation of "this dispute" is embodied in a December 19, 2006, two-page letter from the Attorney General of South Carolina to the Attorney General of North Carolina. *See* Complaint ¶¶ 26-29; App. to S.C. Br. in Support of Complaint at 7-8 (Ex. 2). The *only subject* addressed in that letter was a pending decision by North Carolina's EMC concerning an application for a Certificate authorizing the inter-basin transfer of water by the towns of Concord and Kannapolis, North Carolina. *See id.* The South Carolina Attorney General threatened to bring an action in this Court, but as an alternative offered to "negotiate an interstate compact addressing this issue." *Id.* at 8.

The EMC granted Concord-Kannapolis a 10 MGD IBT Certificate on January 10, 2007. *See* Complaint ¶ 20(b); S.C. Br. in Support of Complaint at 7. Despite the passage of more than two years, however, *no water* has been transferred by those towns or by anyone else pursuant to the Certificate. Consequently, the IBT decision characterized by South Carolina as "this dispute" cannot have caused any of

the alleged harm to present water uses in South Carolina.[1] No *casus belli* there.

South Carolina focuses on one IBT certificate issued to an entity that *has* carried out inter-basin water transfers in North Carolina. The EMC has authorized Charlotte Mecklenburg Utilities ("Charlotte") to transfer up to 33 MGD from the Catawba River basin. *See* Complaint ¶ 20(a); S.C. Br. in Support of Complaint at 7.

South Carolina mentions a third IBT approval held by CRWSP, which is a joint venture between Lancaster County Water and Sewer District in South Carolina and Union County in North Carolina. *See* S.C. Br. in Support of Complaint at 7 n.6. CRWSP withdraws water from the Catawba River *in South Carolina* and makes inter-basin transfers of that water under *approvals granted by the State of South Carolina. See id.*[2]

In all, South Carolina claims that North Carolina has issued Certificates authorizing the inter-basin transfer of 48 MGD of water from the Catawba River pursuant to North Carolina's IBT statute and that these inter-basin transfers exceed North Carolina's equitable share of the river. *See* Complaint ¶¶ 3-4.

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[1] South Carolina alleges that the IBT Certificates issued by the EMC to Charlotte and Concord-Kannapolis "have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River." Complaint ¶ 20. *See also* S.C. Br. in Support of Complaint at 7. That allegation is incorrect as to Concord-Kannapolis; it is true only as to Charlotte.

[2] South Carolina's Complaint makes it appear that this transfer is made by Union County alone, and fails to mention that the water is withdrawn in South Carolina and transferred pursuant to South Carolina approvals. *See* Complaint ¶ 21.

Of the 48 MGD, Charlotte's IBT Certificate authorizes her to transfer 33 MGD, and since 2002 Charlotte has made actual use of her IBT authority. The Concord-Kannapolis Certificate authorizes the transfer of 10 MGD—but that authority has never been exercised. The remaining 5 MGD authorization belongs to Union County, North Carolina—but the water that Union County is authorized to transfer comes from South Carolina with South Carolina's approval. *See* S.C. Br. in Support of Complaint at 7 n.6. Thus, Charlotte's certificated inter-basin transfers are the only such transfers actually being carried out without South Carolina's approval.

South Carolina sums up the allegedly harmful actions in North Carolina with the assertion that Charlotte's transfers and the non-existent Concord/Kannapolis transfers "necessarily reduce the amount of water available to flow into South Carolina, exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina, *and cause the harms detailed above*." S.C. Br. in Support of Complaint at 8 (emphasis added). Similarly, in her Reply Brief, South Carolina asserts that "North Carolina's inequitable interbasin transfers of water out of the Catawba River Basin *have caused*—and continue to threaten—substantial harm to South Carolina * * *." S.C. Reply Br. at 1. (emphasis added). Those *existing* transfers of water from the Catawba River *in North Carolina* are carried out by a single entity: Charlotte.

South Carolina states that she does not know how much water is transferred from the Catawba River basin by entities whose withdrawal amounts are too small (*i.e.*, less than 2 MGD) to require individual approvals under the North Carolina IBT statute. *See*

Complaint ¶ 22. Consequently, South Carolina's Complaint does not allege that these transfers are causing any harm in South Carolina. Moreover, while South Carolina characterizes these transfers as "implicitly permitted" by North Carolina, Complaint ¶ 22, the truth is they simply are not constrained by the North Carolina IBT statute, just as *intra-basin* water withdrawals are not constrained by statute in North Carolina.

Likewise, South Carolina says that she does not know how much water is withdrawn from the basin under a "grandfather" provision of the North Carolina IBT statute, which preserves the ability of water supply entities to utilize facilities that existed or were under construction on July 1, 1993, more than 15 years ago. *See* Complaint ¶ 23. This Court surely did not allow South Carolina to invoke its original jurisdiction based on the unknowns alleged in Paragraphs 22 and 23. *See Idaho* v. *Oregon*, 462 U.S. 1017, 1027 (1983) ("A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury and damage.").

Finally, South Carolina devotes two paragraphs of her Complaint to a thirteen-year-old report by a North Carolina agency on water quality issues in the Catawba River Basin. *See* Complaint ¶¶ 12-13. She alleges that aspects of the report are relevant to the current dispute, *see id.* ¶ 13, but does not allege that any harm in South Carolina is being caused by pollution being discharged in North Carolina or that a decree from the Court should address water quality issues. This Court decided three decades ago that the federal common law no longer pertains to water pollution, that entire field having been preempted by

enactment of the 1972 Amendments to the Federal Water Pollution Control Act. *See City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

2. Actions in North Carolina Not Alleged to Injure South Carolina

South Carolina does not allege that any harm is caused by either of the two most significant factors (other than drought) influencing the flow of the Catawba River into South Carolina. These are: (1) Duke's complete control of river flows by its operation of six dams in North Carolina; and (2) consumptive uses of water within the Catawba River basin in North Carolina. These two factors dictate the flow of the river far more than any other action in North Carolina, and yet South Carolina studiously avoids alleging that her injury is attributable to either.

Because Duke impounds and releases all of the Catawba River in North Carolina, its operations control virtually all of the flows entering South Carolina, which would receive but a trickle of water during droughts but for Duke's ability to store water in wet periods and release it in dry periods. Duke performs this service under the terms of its federal license issued by the Federal Energy Regulatory Commission ("FERC"). As Duke has explained, the license requires water releases for numerous purposes, including downstream protection of fish and wildlife habitat and other water uses in South Carolina. *See* Duke Br. in Support of Mot. to Intervene at 2. Under its current license, Duke is required to release a minimum average daily flow into South Carolina of 411 cubic feet per second ("cfs"). *See* Duke Br. in Opp. to S.C. Exceptions at 5, 6. Pursuant to the new FERC license that Duke expects to

receive based on the Comprehensive Relicensing Agreement ("CRA"), that minimum flow would increase substantially to the range of 700 cfs to 1,300 cfs depending on the severity of drought conditions. *See id.* at 6. These increased flows are made possible, in part, by the increasingly stringent water conservation measures that North Carolina water users, such as Charlotte, already are required to implement according to their obligations as signatories to the CRA. *See id.* at 7.[3]

Although South Carolina mentions Duke's reservoir operations and their value to the region for hydropower generation, *see* S.C. Br. in Support of Complaint at 3-4, she does not allege that Duke's retention of river water or any inadequacy of reservoir releases have caused harm to South Carolina, and she seeks no injunctive relief that would alter Duke's release of water into South Carolina in the least. South Carolina seeks specific injunctive relief that would curtail Charlotte's inter-basin transfers from the North Carolina portion of the river, but nothing in South Carolina's Complaint seeks to prevent Duke from retaining that water for support of higher reservoir levels in North Carolina (*e.g.*, for energy capacity or to support recreation) rather than releasing it to increase river flows in South Carolina. South Carolina has not sued Duke or FERC, and she now opposes Duke's participation in the lawsuit. Indeed, she has acknowledged that the CRA and Duke's new FERC license will establish the mini-

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[3] In addition to being a signatory to the CRA, Charlotte occupies one of 12 seats on the Final Approval Committee. *See* CRA § 26.1; *see also* Charlotte's Mot. for Leave to Intervene at 8-10 (describing Charlotte's part in the CRA)

mum flow requirements to which Duke will have to adhere. *See* S.C. Exceptions at 50.

In addition, a variety of users in North Carolina withdraw and consume large amounts of water *within* the Catawba River basin, but South Carolina makes no mention of these uses and seeks no relief designed to affect them. From the lowest three reservoirs in North Carolina, for example—Norman, Mountain Island and Wylie—Duke withdraws and uses over 80 MGD and Charlotte withdraws and uses nearly 100 MGD. *See* CRA, App. H. No permit from North Carolina is required for these withdrawals. For its part, Charlotte is required to obtain FERC's permission for its withdrawals from these Duke-operated reservoirs.

3. South Carolina's Statement of the Question Presented for Review

South Carolina has framed the issue to be decided in this lawsuit as follows:

> Whether North Carolina's interbasin transfer statute is invalid under the Supremacy Clause of the United States Constitution and the constitutionally based doctrine of equitable apportionment because North Carolina, pursuant to that statute, has authorized and continues to authorize transfers of water from the Catawba River in excess of its equitable share of the waters of that interstate river, thereby harming South Carolina and its citizens. [S.C. Br. in Support of Complaint at i.]

Thus, South Carolina's own Question Presented focuses *exclusively* on the validity of North Carolina's IBT statute, inter-basin transfers from the Catawba River authorized pursuant to that statute, and the

harm to South Carolina allegedly caused by those transfers. South Carolina asserts that *those* transfers, in and of themselves, exceed North Carolina's equitable share of the Catawba River. *See* S.C. App. for Prelim. Inj. at 2 ("The transfers that North Carolina has authorized to date already exceed its equitable share of the Catawba River * * *."). South Carolina does not raise, as an issue in the case, either Duke's control of releases into South Carolina or the large intra-basin water uses made by Duke, Charlotte, and others. As explained above, the only such inter-basin transfer of water from North Carolina's portion of the river is Charlotte's.

4. South Carolina's Prayer for Relief

South Carolina aims its Prayer for Relief directly at the North Carolina IBT statute and the transfers authorized pursuant to that statute, *i.e.*, Charlotte's IBT Certificate. South Carolina seeks the following relief: (1) a decree declaring that "the North Carolina inter-basin statute cannot be used to determine each States' share of the Catawba River and equitably apportioning the Catawba River," and (2) a decree enjoining North Carolina "from authorizing transfers of water from the Catawba River" exceeding North Carolina's equitable share and also declaring that "the North Carolina inter-basin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment." Complaint at 10 (Prayer for Relief ¶¶ 1-2).

South Carolina's Prayer for Relief is noteworthy in that it does not claim entitlement to a specific quantum of Catawba River water or identify the amount of water by which North Carolina is allegedly exceeding its fair share. South Carolina seeks an equitable

apportionment, but she does so only in service of an effort to curtail the inter-basin transfers authorized by North Carolina's IBT statute and allegedly causing her harm—that is, Charlotte's inter-basin transfers. South Carolina seeks equitable apportionment, not as an end in itself, but as a means to restrict the North Carolina IBT statute and Charlotte's inter-basin transfers.

In sum, from its allegations of harm-causing actions in North Carolina, to its statement of the Question Presented, to its Prayer for Relief, South Carolina has focused *solely* upon *existing* inter-basin transfers in North Carolina, while never complaining of other water uses that determine the river's flow, and while seeking no injunctive relief against those uses. And the only certificated IBT authority in North Carolina actually in use—the only IBT authority of which South Carolina complains—is Charlotte's. South Carolina has styled her Complaint as one State against another, but the Complaint's allegations and requests for relief are aimed directly at the City of Charlotte.

SUMMARY OF ARGUMENT

1. The City of Charlotte's inter-basin transfers and certificated IBT authority are the true targets of South Carolina's Complaint. Charlotte should be allowed to become a party defendant in this case because she is "the authorized agent for the execution of the sovereign policy which [allegedly] threaten[s] injury to" South Carolina. *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*). Charlotte's position in this case is virtually identical to that of New York City in *New Jersey* v. *New York*,

which this Court said was proper party defendant in that case.

2. Charlotte should not be denied party status merely because her home state of North Carolina is already a party. South Carolina's reliance upon the denial of the City of Philadelphia's motion to intervene in the *New York* case is misplaced. Among other reasons, Pennsylvania opposed Philadelphia's motion to intervene on sovereignty grounds while North Carolina supports Charlotte's motion to intervene.

If Charlotte must make some showing of inadequacy of representation, Charlotte can do so. North Carolina may not adequately represent Charlotte in this action because their interests are not coextensive. North Carolina must represent the interests of all North Carolina citizens, while Charlotte has a narrower interest in representing her residents and those in her service area. Furthermore, North Carolina must balance the interests of both upstream and downstream users of the Catawba River, while Charlotte's interest is exclusively that of a downstream user.

3. Allowing Charlotte to intervene will not lead to unlimited intervention, create problems with respect to case management, or impede a possible settlement of the case.

ARGUMENT

The Special Master correctly concluded that the City of Charlotte should be allowed to intervene as a party defendant in this case. The Court should give deference to the Special Master's findings and conclusion with respect to Charlotte's proposed inter-

vention. Rulings on intervention motions are generally reviewed for abuse of discretion. *See Georgia* v. *Ashcroft*, 539 U.S. 461, 477 (2003) ("[T]he District Court did not abuse its discretion in granting the motion to intervene in this case."); *NAACP* v. *New York*, 413 U.S. 345, 366 (1973) (timeliness of intervention motion "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review"); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944) ("The exercise of discretion in a matter of this sort [permissive intervention] is not reviewable by an appellate court unless *clear abuse* is shown; * * *.") (emphasis added). As shown below, the Special Master's ruling on Charlotte's motion to intervene was a proper exercise of her delegated authority "to direct subsequent proceedings" in the case. *South Carolina* v. *North Carolina*, 128 S. Ct. 1117 (2008).

I. CHARLOTTE IS A PROPER PARTY DEFENDANT IN THIS ACTION BECAUSE CHARLOTTE'S INTER-BASIN TRANSFER AUTHORITY IS THE REAL TARGET OF SOUTH CAROLINA'S COMPLAINT.

The City of Charlotte should have a right to become a party to this original action, first and foremost, because Charlotte is the entity in North Carolina vested with the authority to carry out the inter-basin transfers of Catawba River water that is the true target of South Carolina's Complaint. *See* SM Report at 21.

Charlotte possesses a Certificate, issued in 2002 by the EMC, authorizing Charlotte to execute inter-basin transfers from the Catawba River of 33 MGD. *See* Ex. 2 to Charlotte Mot. for Leave to Intervene.

Charlotte's IBT Certificate was issued pursuant to North Carolina's IBT statute. *See* N.C. Gen. Stat. § 143-215.22L.

South Carolina's Complaint focuses upon the 48 MGD of water authorized by North Carolina law and the EMC to be transferred from the Catawba River basin. *See, e.g.*, Complaint ¶¶ 3, 20. Indeed, South Carolina specifically complains about Charlotte's IBT Certificate authorizing "the Charlotte-Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied." *Id.* ¶ 20(a). As the Special Master found, inter-basin transfers are "the central focus of the Complaint." SM Report at 9. Indeed, inter-basin transfers "are the primary if not the exclusive means by which South Carolina claims to have been harmed." *Id.* at 38. Charlotte's IBT authority represents the lion's share of such authority licensed by the EMC, and to date Charlotte is the only entity to have actually transferred water from the North Carolina portion of the river pursuant to an EMC Certificate.

Moreover, the relief that South Carolina seeks directly targets Charlotte's IBT authorization. South Carolina seeks a decree "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with" North Carolina's share of the Catawba River. Complaint at 10 (Prayer for Relief ¶ 2). And South Carolina has already made clear its contention that Charlotte's IBT authorization exceeds North Carolina's share of the river. *See* S.C. App. for Prelim. Inj. at 2 ("The transfers that North Carolina has authorized to date

already exceed its equitable share of the Catawba River * * *.").

That Charlotte should be a party to this action is strongly supported by New York City's party status in *New Jersey* v. *New York*. In that case, New Jersey sued the State and City of New York in 1929 to enjoin a proposed diversion of water from the Delaware River "in order to increase the water supply of the City of New York." *New Jersey* v. *New York*, 283 U.S. 336, 342 (1931).[4] New York City was present in the case as a party, this Court explained, "since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. 369, 375 (1953) (*per curiam*). "New Jersey joined the City of New York as a defendant, because the City, acting under State authority, was planning the actual diversion of the water for its use." *Id.* at 370-371.

Charlotte's position in this case is virtually identical to that of New York City in the *New York* case. Charlotte is the "authorized agent for the execution of the sovereign policy" which allegedly injures South Carolina—*i.e.*, the inter-basin transfers of Catawba River water—and it is Charlotte that, "acting under State authority," is responsible for the "actual diversion" of water that South Carolina claims is injurious. *Id.* at 370, 375. *See also* SM Report at 13-14, 22, 39 (analyzing and applying *New York*).

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[4] The Commonwealth of Pennsylvania promptly moved to intervene, and this Court granted the motion in January 1930. *See New Jersey* v. *New York*, 280 U.S. 528 (1930) (order).

To be sure, New York City, unlike Charlotte, "was forcibly joined as a defendant to the original action." *New York*, 345 U.S. at 375. But the fact that South Carolina omitted Charlotte from the case caption as a named defendant—while targeting Charlotte in her allegations, claims, and prayer for relief—in no way undermines the propriety of allowing Charlotte voluntarily to join the litigation as a party defendant. "Even though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought against it, and it 'should have suitable opportunity to show the nature of [its] interest and why the relief against [it] individually should not be granted.'" SM Report at 22-23 (quoting *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930) (Special Master's brackets)). As the Special Master reasoned, the injunction that South Carolina seeks—*i.e.*, one that would invalidate North Carolina's IBT statute and the IBT certificates issued thereunder, including Charlotte's—"would affect Charlotte directly, such that it should be permitted to defend itself" in this action as a party. SM Report at 22 (citing *Utah* v. *United States*, 394 U.S. 89, 92 (1969) (*per curiam*)). Given that South Carolina's Complaint takes direct aim at Charlotte's IBT authority, "it would seem fairest to permit [Charlotte] to speak for itself" in defense of that authority. *Utah*, 394 U.S. at 92.

South Carolina may be the master of her complaint, *see* S.C. Exceptions at 31, but that maxim is subject to the doctrines of joinder and intervention. *See Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 91 (2005). A plaintiff's right to pick her opponents does not trump the right of other interested persons to join the fray—especially in the context of an original

action. *See* SM Report at 16-17. Moreover, as the master of her complaint, South Carolina specifically complained of Charlotte's inter-basin transfers pursuant to her IBT Certificate—the only such certificated transfers currently taking place—and South Carolina seeks an injunction against Charlotte's transfers. Having aimed her Complaint at Charlotte, South Carolina should not be surprised that Charlotte seeks to join the case to defend her interests.

Missouri v. *Illinois*, 180 U.S. 208 (1901), provides further support for affording Charlotte party status. *See* SM Report at 14. In that original action, Missouri filed a bill of complaint against Illinois and the Sanitary District of the City of Chicago seeking to enjoin those two defendants from discharging sewage into the Mississippi River. Ruling on a demurrer to the bill, this Court deemed both Illinois and the Chicago Sanitary District to be proper party defendants. With respect to the Chicago Sanitary District, this Court commented that it "is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." 180 U.S. at 242. Exactly the same can be said here of the City of Charlotte.

South Carolina argues that Charlotte's interest in defending her IBT Certificate is not "compelling." S.C. Exceptions at 44. South Carolina's argument is based on the erroneous premise that Charlotte's IBT authority under North Carolina law is irrelevant in equitable apportionment analysis. The Special Master rightly rejected this argument. *See* SM Report at 36 (South Carolina's "argument does not accurately state the role of state law in equitable

apportionment analysis."); *id.* at 37 ("The Court consistently has held that state law, and water uses authorized by state law, are to be considered and weighed as the circumstances require."). Charlotte's interest in preserving her rights under the IBT Certificate issued by the EMC should be given significant weight in any equitable apportionment of the Catawba River. *See, e.g., Idaho* v. *Oregon*, 462 U.S. 1017, 1025 (1983) (although not necessarily dispositive, "existing legal entitlements are important factors in formulating an equitable decree"); *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945) (in equitable apportionment analysis, "the extent of established uses" is one of several "relevant factors"); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-671 (1931) (equitable apportionment is based "upon a consideration of the pertinent laws of the contending States and all other relevant factors").

Charlotte's interest in defending her IBT certificate issued by the EMC qualifies as a "significantly protectable interest" for purposes of intervention analysis, *Donaldson v. United States*, 400 U.S. 517, 531 (1971), and gives Charlotte a "direct stake in this controversy." *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). Without question, Charlotte "has a vital interest in this case." *Lincoln Prop. Co.*, 546 U.S. at 92-93. Indeed, since Charlotte's inter-basin transfers are the true target of South Carolina's Complaint, Charlotte is properly characterized as a real party in interest in this case. *See Sierra Club* v. *Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) (intervenors were "real parties in interest" in environmental litigation where plaintiff's complaint "target[ed]" intervenor's conduct and the injunctive relief sought by plaintiff was "intend[ed] to have a direct impact

upon" intervenors); *see also Conservation Law Found. of New England, Inc.* v. *Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (intervenors were "the real targets of the suit").

Because South Carolina seeks to nullify Charlotte's IBT certificate, Charlotte is, in the terminology of Federal Rule of Civil Procedure 19, a "required party" to this litigation. Under Rule 19, a person is a "required party" if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i); *see Republic of Philippines* v. *Pimentel*, 128 S. Ct. 2180, 2184-85 (2008) (discussing the 2007 revision to Rule 19). Here, Charlotte's interest in her IBT certificate clearly relates to the subject matter of this original action, and the relief South Carolina seeks, if granted, would certainly impair or impede Charlotte's ability to protect that interest. Charlotte should therefore be allowed to intervene. *See* Advisory Committee Notes to 1966 Amendment to Fed. R. Civ. P. 24 ("Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) [now 19(a)(1)(B)(1)] on joinder of persons needed for a just adjudication").

II. CHARLOTTE SHOULD NOT BE DENIED THE RIGHT TO INTERVENE SIMPLY BECAUSE NORTH CAROLINA IS A PARTY.

Charlotte should not be denied the status of a party defendant—and the opportunity to defend her IBT authority—on the ground that her home state of North Carolina is already a defendant.

A. Charlotte's Situation Differs in Material Respects From That of the City of Philadelphia in *New Jersey* v. *New York*.

South Carolina relies on the *New York* case and this Court's decision to deny the City of Philadelphia's request to intervene in that action. But the Court had compelling reasons to deny Philadelphia's motion to intervene that do not apply to Charlotte. Charlotte's situation differs in several material respects from that of the City of Philadelphia.

First, Philadelphia was not "the authorized agent for the execution of the sovereign policy which threatened injury" to the plaintiff State. *New York*, 345 U.S. at 375. Charlotte is. In *New York*, Philadelphia argued that she should be allowed to intervene because New York City was already present in the case as a party. *See id.* at 374. Rejecting the argument, this Court explained that New York City was a proper party because, unlike Philadelphia, "she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *Id.* at 375. Here, Charlotte's position in the case is analogous to that of New York City, not Philadelphia. As the authorized agent of the alleged injury about which South Carolina complains, it is proper for Charlotte to join this case as a party defendant. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 637 (9th ed. 2007) (observing that, although Philadelphia was denied intervention in *New York*, in the same case the joinder of New York City "whose action was threatening the plaintiff state was said to be proper").

Second, the Commonwealth of Pennsylvania—Philadelphia's home state—*opposed* Philadelphia's proposed intervention. So did every other party—

New Jersey, New York State, and New York City. *See New York*, 345 U.S. at 372 ("All of the present parties to the litigation have formally opposed the motion to intervene * * *."). Pennsylvania strongly opposed Philadelphia's intervention on sovereignty grounds, arguing that "such intervention would not only be in derogation of the sovereignty and prerogatives of the Commonwealth, but would also be subversive of the right and duty of its Attorney General to represent the Commonwealth in all actions and to conduct any litigation on its behalf and on behalf of its citizens." Answer on Behalf of Commonwealth of Pennsylvania, Intervenor, to Intervening Petition of City of Philadelphia ¶ 15, *New Jersey* v. *New York*, No. 5, Orig. (U.S. filed Dec. 31, 1952). The forceful opposition of Philadelphia's home state (not to mention every other party) was surely a significant factor in the Court's decision to deny intervention.

Here, in contrast, North Carolina does not oppose Charlotte's intervention—a fact that the Special Master considered. *See* SM Order at 9 ("Notably, North Carolina has not objected to Charlotte's proposed intervention."). Indeed, North Carolina *supports* giving Charlotte party status. *See* N.C. Br. in Opp. to S.C. Exceptions at 23 ("North Carolina agrees with the Special Master's recommendation that Charlotte be allowed to intervene."). North Carolina states that "Charlotte has a substantial and compelling interest in requesting leave to intervene" and that, just as New York City was permitted to appear as a defendant in the *New York* case, "Charlotte should be permitted to participate as a defendant here." *Id.* at 21-22, 22. Thus, South Carolina is simply wrong to say that "North Carolina and Charlotte stand in precisely the same relationship as

Pennsylvania and Philadelphia in *New Jersey* v. *New York*." S.C. Exceptions at 40. Pennsylvania strongly opposed Philadelphia's intervention; North Carolina supports Charlotte's.[5]

That Philadelphia's home state opposed her proposed intervention, while Charlotte's home state does not oppose hers, is a significant difference between the two cases. The principle that a State ordinarily is deemed to represent all its citizens is in large measure "a necessary recognition of sovereign dignity." *New York*, 345 U.S. at 373. "Otherwise, a state might be judicially impeached on matters of policy by its own subjects * * *." *Id.* Here, however, North Carolina supports Charlotte's motion to intervene and perceives no affront to her sovereignty from Charlotte's joining this case as a co-defendant. Indeed, North Carolina "is not concerned that it will be judicially impeached by Charlotte's positions in this action." N.C. Br. in Opp. to S.C. Exceptions at 23. Thus, North Carolina's prerogatives as a sovereign State are not a reason to exclude Charlotte from the case.

In any event, the "sovereign dignity" at issue here belongs to North Carolina, not South Carolina.

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[5] That Charlotte's home state does not oppose her intervention also distinguishes Charlotte's situation from that of Basin Electric Power Cooperative, which sought to intervene in *Nebraska* v. *Wyoming* against the wish of its home state of Wyoming. "Wyoming opposed intervention by Basin Electric on the basis of her *parens patriae* role in equitable apportionment proceedings." Special Master's First Interim Report at 11, *Nebraska* v. *Wyoming*, No. 108, Orig. (U.S. filed June 26, 1989). Furthermore, as Duke explains, the Special Master granted a renewed motion to intervene filed by Basin Electric. *See* Duke Br. in Opp. to S.C. Exceptions at 22-23.

South Carolina lacks standing to raise North Carolina's sovereign prerogatives in opposition to Charlotte's intervention where North Carolina has not done so. *See* Hrg. Tr. 63; *see also Ponzi* v. *Fessenden*, 258 U.S. 254, 260 (1922) (a sovereign's decision whether or not to assert a right of sovereignty "is a matter that addresses itself solely to the discretion of the sovereignty making it").

Third, Philadelphia sought to intervene in the *New York* case more than twenty years too late. New Jersey filed suit against the New York defendants in 1929, Pennsylvania intervened in 1930, and this Court entered its original decree in 1931. Philadelphia did not move to intervene until 1952—more than two decades after each of these events. *See New York*, 345 U.S. at 370-374.[6] Here, Charlotte timely filed her motion to intervene just weeks after this Court appointed the Special Master. South Carolina does not contend, and has never contended, that Charlotte's motion to intervene was untimely.

B. Charlotte Should Not be Denied Party Status Based on the Claim That North Carolina Will Adequately Represent Charlotte's Interests.

South Carolina argues that Charlotte should be denied intervention because Charlotte is adequately represented by North Carolina. In so doing, South Carolina leans heavily upon the *New York* Court's statement that "[a]n intervenor whose state is already a party should have the burden of showing

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[6] Philadelphia filed its motion to intervene on December 13, 1952, eight months after New York City, supported by New York State, had moved on April 1, 1952 to modify in certain respects the 1931 decree.

some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373.

New York did not announce a categorical imperative forbidding a city's presence as a party in a case where the city's home state is already party. *See* SM Report at 23 ("[T]here is no indication the Court intended this to mean that there must be a conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests."). In *New York* itself, the Court did not require any party to show cause why New York City was not adequately represented by New York State. This Court did not do so when New Jersey filed suit in 1929 against both the State and City of New York or when New York City moved in 1952 to modify the decree previously entered in that case.

Nor has the Court always required an intervening city to make the showing suggested in *New York*. In *Texas* v. *Louisiana*, this Court permitted the City of Port Arthur, Texas, to intervene even though Texas was already a party. *See Texas* v. *Louisiana*, 416 U.S. 965 (1974) (order granting Port Arthur's motion to intervene); *see also Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976) (noting that Port Arthur "was permitted to intervene for purposes of protecting its interests in the island claims of the United States"). Port Arthur did not attempt to make the showing suggested in *New York*, and this Court granted Port

Arthur's motion to intervene without demanding such a showing.[7]

This Court has explained that a "state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173 (1930). Thus, "[c]itizens, voters, and taxpayers, *merely as such*, of either state, *without a showing of any further and proper interest*, have no separate individual right to contest in such a suit the position taken by the state itself." *Id.* (emphases added). Were the rule otherwise, "all the citizens of both states * * * would be entitled to be heard." *Id.*

But when a State in an original action seeks relief against a citizen of another State, that citizen has a right to be in the case as a party. "An individual citizen may be a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted." *Id.* at 173-174. Here, Charlotte's inter-basin transfers are the real target of the relief that South Carolina seeks. Accordingly, Charlotte should have the opportunity to appear on her

[7] The propriety of allowing cities to appear on their own behalf and conduct their own defense in original actions is confirmed by *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). In that case, the State of Illinois sued four Wisconsin cities but not did not name as a defendant the State of Wisconsin. This Court concluded that Illinois was not required to bring Wisconsin into the case, explaining that "while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one." *Id.* at 97.

own behalf, defend her IBT authority (including by developing a record justifying that authority), and argue against South Carolina's allegations of injury and claims for relief.

Furthermore, this Court has described the statement from *New York* on which South Carolina relies as a "general rule" and has compared it to Federal Rule of Civil Procedure 24(a)(2). *Nebraska* v. *Wyoming*, 515 U.S. 1, 21 (1995). And this Court has explained that the adequacy of representation requirement in Rule 24 "should be treated as minimal." *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The requirement is satisfied so long as the intervenor "shows that representation of his interest 'may be' inadequate." *Id.* There need only be "sufficient doubt about the adequacy of representation to warrant intervention." *Id.* at 538.[8]

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[8] What this Court said in *Trbovich*—that the adequacy of representation requirement is a "minimal burden" that is satisfied if the representation "may be" inadequate—is now well-established law in the courts of appeals. *See, e.g., Utah Ass'n of Counties* v. *Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001); *Sierra Club* v. *Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994); *Sierra Club* v. *Robertson*, 960 F.2d 83, 85-86 (8th Cir. 1992) ("The proposed intervenors need show only that there is a *potential* for inadequate representation." *Grutter* v. *Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (emphasis in original). "One is not required to show that the representation will in fact be inadequate." *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). Furthermore, where, as here, an intervenor shows "that a very strong interest exists," a "lesser showing of impairment or inadequacy of representation" is sufficient. *United States* v. *Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (Friendly, J.). *Accord Daggett* v. *Commission on Gov't. Ethics & Election Practices*, 172 F.3d 104, 113-114 & n.3 (1st Cir. 1999).

Here, the State of North Carolina may not adequately represent the City of Charlotte's interests because their interests are not co-extensive. North Carolina is "obliged to represent the interests of all [North Carolina] citizens" while Charlotte "has a narrower but independently vital interest in representing its residents." *Sierra Club* v. *Glickman*, 82 F.3d 106, 110 (5th Cir. 1996). In *Sierra Club* v. *Glickman*, the Fifth Circuit held that the U.S. Department of Agriculture did not adequately represent the State of Texas in a suit alleging the overpumping of a Texas aquifer. Similarly, North Carolina may not adequately represent Charlotte in this suit alleging overconsumption of the Catawba River because North Carolina must represent the interests of the entire State, not just Charlotte's narrower interests. Just as Texas was entitled to intervene in *Sierra Club* v. *Glickman*, Charlotte should be allowed to intervene here. *See also Sierra Club* v. *City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (in separate suit over same aquifer, finding it "axiomatic" that the interests of several Texas cities "that rely on the aquifer's water supply for their immediate subsistence, will diverge from those of * * * the state *qua* state and as *parens patriae*"); *Forest Conserv. Council* v. *U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("The Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County.") (holding that the State and County were entitled to intervene in environmental litigation brought against the Forest Service).

That Charlotte has a narrower interest than North Carolina is reflected in the Answer that each filed. North Carolina asks the Court to "[d]eny any af-

firmative relief requested by Plaintiff" and to "[d]ismiss the Complaint with prejudice." N.C. Answer to Bill of Complaint at 26. Charlotte requests that general relief but also seeks relief specific to Charlotte. Charlotte has asked the Court to "[p]rotect Charlotte's interest in its interbasin transfers authorized pursuant to North Carolina law," "[p]rotect Charlotte's interests in sufficient Catawba River withdrawals to fully satisfy Charlotte's present and future water supply needs," and "[p]rotect Charlotte's interests arising out of and related to Duke's current FERC License, the Comprehensive Relicensing Agreement, and any new FERC license to be issued." Answer of the City of Charlotte at 13. In addition, Charlotte has raised Charlotte-focused defenses that North Carolina has not specifically raised. For example, for her Fifth Defense Charlotte contends that South Carolina's claims are barred, at least in part, by the doctrines of laches and estoppel because South Carolina participated in the proceedings before the EMC relating to Charlotte IBT application and did not oppose Charlotte's application in those proceedings. *See id.* at 11.

Since Charlotte's interests and North Carolina's differ, Charlotte should not be denied intervention. "[T]he fact that North Carolina's interests may be similar to Charlotte's does not preclude it from appearing and defending its [inter-basin] transfer permit." SM Report at 24. In the American legal system, it is fundamental that a party generally may not be denied the opportunity to appear in court on his own behalf on the theory that his interests are adequately represented by someone else. *Cf. Taylor* v. *Sturgell*, 128 S. Ct. 2161 (2008) (disapproving the preclusion doctrine of "virtual representation").

The interests of North Carolina and Charlotte necessarily differ because North Carolina must represent the interests of all water users in the State along the Catawba River, including municipal users upstream of Charlotte whose interests may not be aligned with Charlotte's interests. Charlotte's interest, meanwhile, is exclusively that of a downstream water user.

The Eighth Circuit in *South Dakota* v. *Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) (*South Dakota*), *cert. denied*, 541 U.S. 987 (2004), addressed a similar situation. There, the State of South Dakota sued the U.S. Army Corps of Engineers over the Corps' decisions with respect to the release of water from reservoirs on the Missouri River. The State of Nebraska moved to intervene, but the District Court denied the motion. Relying on the *parens patriae* principle, the District Court ruled that Nebraska's interests were adequately represented by the Corps.

The Eighth Circuit reversed and held that Nebraska was entitled to intervene as a matter of right. Addressing *parens patriae*, the Eighth Circuit observed that "[t]he Corps is charged with managing the Missouri River system as a whole—a charge that requires it to balance the interests of upstream and downstream users. The proposed intervenors, on the other hand, wish to represent exclusively downstream interests." 330 F.3d at 1025. In light of the Corps' charge to represent both upstream and downstream users, the Eighth Circuit reasoned that the *parens patriae* principle was not a bar to Nebraska's intervention. As the Eighth Circuit stated:

> South Dakota asks this Court to hold that the Corps will adequately represent downstream us-

> ers. We decline to do so. Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case. The *parens patriae* presumption, therefore, does not present an obstacle to intervention. [*Id.*]

South Dakota illustrates a salient difference between Charlotte's interest and North Carolina's. Charlotte sits on the border between North Carolina and South Carolina, and Charlotte's service area extends downstream of all other North Carolina users of the Catawba River. North Carolina—like the Corps in *South Dakota*—must "balance [the] multiple interests" of all "upstream and downstream users" of the river in the State whereas Charlotte's interests are "exclusively downstream." *Id.*

C. Charlotte Easily Meets the Criteria for Permissive Intervention.

Arizona v. *California*, 460 U.S. 605 (1983), supports Charlotte's intervention notwithstanding South Carolina's adequate representation argument. There, this Court allowed certain Indian Tribes to intervene in an equitable apportionment action. The United States did not oppose the Tribes' intervention, but the plaintiff State and all four defendant States opposed intervention "on grounds that the presence of the United States insures adequate representation of the Tribes' interests." *Id.* at 611. This Court rejected the argument, reasoning that "it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." *Id.* at 614-615. Charlotte, too, clearly meets the test for permissive intervention. *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely

motion, the court may permit anyone to intervene who * * * has a claim or defense that shares with the main action a common question of law or fact."). Here, Charlotte's defense of her IBTs and IBT authority go to the heart of the factual and legal questions in this case.

The instant case also conforms to *Arizona* v. *California* because the party said to represent Charlotte's interests—North Carolina—does not oppose Charlotte's intervention while the party opposing intervention—South Carolina—"ha[s] failed to present any persuasive reason why [its] interests would be prejudiced or this litigation unduly delayed by [Charlotte's] presence." 460 U.S. at 615. *See* SM Report at 42.

III. GRANTING CHARLOTTE'S MOTION TO INTERVENE WILL NOT LEAD TO UNLIMITED INTERVENTION, CREATE CASE MANAGEMENT PROBLEMS, OR IMPEDE SETTLEMENT.

Drawing again on language in the *New York* case, South Carolina argues (Exceptions at 41-44) that Charlotte cannot demonstrate an interest "apart from [her] interest in a class with all other citizens and creatures of the state." *New York*, 345 U.S. at 373. If Charlotte were allowed to intervene, South Carolina contends, "there would be no practical limitation on the number" of other North Carolina entities that would be entitled to intervene. *Id.*

The Special Master considered and rejected South Carolina's argument. *See* SM Order at 9 ("Charlotte has a special interest that sets it apart from the other citizens and creatures of the state whom North Carolina represents as *parens pa-*

triae."); SM Report at 25 ("Because Charlotte's right to intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint, there is a practical limitation on the number of similarly situated entities that would be entitled to be made parties.").

Not only is Charlotte the largest municipality and provider of water supply services in the Catawba River basin, but Charlotte holds the IBT certificate authorizing the largest and most significant interbasin transfers of Catawba River water. And Charlotte is the *only* entity actually transferring water out of the basin from North Carolina's portion of the river pursuant to an IBT Certificate. Accordingly, Charlotte is hardly "in a class with all other citizens and creatures of the state." *New York*, 345 U.S. at 373. There are other municipalities along the Catawba River, but Charlotte's size, her certificated IBT authority, and her actual exercise of that authority, place her in a class by herself. *See* SM Order at 8 ("Charlotte has a unique interest in protecting its inter-basin transfer permit.").

In February 2008, when South Carolina first opposed Charlotte's motion to intervene, South Carolina predicted that if Charlotte's motion were granted, "then it would seem inevitable that many more such motions will follow." S.C. Opp. to Charlotte's Mot. for Leave to Intervene at 6. South Carolina's prediction was not just wrong—it was as wrong as it could be. Not a single intervention motion followed Charlotte's. The Special Master granted Charlotte's motion in May 2008, yet no other entity has attempted to intervene since she so ruled. In all, a grand total of three entities have sought leave to intervene in this action. This Court has said that

"[o]ur original jurisdiction should not be * * * expanded to the dimensions of ordinary class actions." *New York*, 345 U.S. at 373. Allowing Charlotte to join this case will not cause the proceedings to take on the size of a typical class action. Furthermore, any other entity seeking to join the litigation at this point would have to explain why its intervention was not untimely.

Nor will intervention cause case management problems. The intervenors have actively participated in this case for almost a year, including in multiple conferences with the Special Master. She has concluded that their inclusion will aid, not thwart, the adjudication of this matter and that any "particular issues or objections relating to participation by Intervenors may be addressed as part of the case management process." SM Report at 34.

Finally, contrary to the concern expressed by the Solicitor General (Br. for U.S. as *Amicus Curiae* at 21), allowing the intervenors to join the case will not make settlement less likely. In fact, just the opposite is true. A viable and lasting settlement that can win all of the necessary approvals is more likely to come about if all of the parties with the greatest interest in this matter are allowed to join this case and help shape the terms of any agreed-upon resolution.

CONCLUSION

For the foregoing reasons, South Carolina's exceptions to the Special Master's First Interim Report should be overruled, and Charlotte's motion to intervene should be granted.

Respectfully submitted,

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